INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Burton v. *Driggs*, 20 Wall. 125	9
Gordon v. *United States*, 344 U.S. 414	9
McClanahan v. *United States*, 292 F. 2d 630, certiorari denied, 368 U.S. 913	9
McDonold v. *United States*, 200 F. 2d 502	8
United States v. *Cotter*, 60 F. 2d 689, certiorari denied, 287 U.S. 666	8
United States v. *Mortimer*, 118 F. 2d 266, certiorari denied, 314 U.S. 616	8

Statutes and rule involved:

18 U.S.C. 371	2
18 U.S.C. 656	2
Rule 19G, General Rules of the United States District Court for the District of New Jersey	10

330-473—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 840

MILTON HECHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a–6a) was entered on November 19, 1968. On December 16, 1968, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly admitted into evidence oral evidence concerning the audit of petitioner's bank accounts.

2. Whether the trial judge, after a hearing, properly denied a motion for a new trial based on allegations that a juror's husband had attended the trial and talked to jurors, witnesses, and the prosecutor.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to misapply the funds of a national bank (18 U.S.C. 371, 656). On January 29, 1968, petitioner was sentenced to imprisonment for three years and fined $5,000.

1. Between 1960 and 1965 the Citizens National Bank of Englewood, New Jersey, suffered a loss in excess of $300,000 due to the misapplication of bank funds by one of its officers, co-indictee Francis J. Paxton (R. 532, 588, 1230). Paxton was in charge of the bookkeeping operations of the multi-branch bank (R. 253). Petitioner maintained at the bank a personal checking account and corporate accounts for two family-owned businesses, Colortone Photo Service and Starbrite Photo Corporation (R. 41–42).

(a) Paxton testified as a prosecution witness that he had agreed with petitioner to "hold back" any checks drawn by petitioner against insufficient funds, and not to post them or debit petitioner's accounts. Paxton would telephone petitioner when the bank received checks drawn on insufficient funds and advise him of the need to cover the checks. Petitioner would either advise return of the check to the payee (R. 283–284, 415, 962, 972) or promise to make the necessary deposits. When petitioner failed to deposit

the required sum (R. 98, 110). Paxton, initially as an accommodation, but later for a fee of $50 per month (R. 103, 243), would not return the checks to the clearing house. Whenever checks are not returned, the clearing house debits the drawer's bank (Citizens) and credits the payee's bank (R. 87–102, 109–110, 456–457).

Paxton would then place petitioner's unreturned N.S.F. checks in a file cabinet in the vicinity of his office (R. 95), without debiting any of the petitioner's three accounts (R. 102, 396–398). In the early years of the scheme, Paxton was able to conceal the non-debiting—and thus the financial loss suffered by the bank when the clearing house credited the payees of petitioner's checks—by "adjusting" the bank balances of innocent and inactive accounts (R. 233). Upon petitioner's request (R. 118) Paxton was also able to create false deposits to petitioner's accounts (R. 119, 254, 853). When in 1964 the bank adopted a computer system of bookkeeping, Paxton's system changed. On November 23, 1964, for example, three Starbrite checks totalling $7,790 and payable to a Lou Jacobs were paid by the bank but the computer was programed so that it could not debit the Starbrite account (R. 44, 63, 138, 143). Paxton also covered some of petitioner's checks during this period by punching out on the computer fictitious deposits to petitioner's Starbrite account. He created three such deposits during the period June 15–July 13, 1965, in the amounts of $20,000, $7,301.16, and $1,650 (R. 155–168, 473).

On October 11, 1965, after a different accounting firm appointed by the bank conducted a surprise

audit (R. 501, 523), Paxton confessed his guilt.[1] He directed bank officials and federal investigators to his desk drawer and file cabinet where they found the three November 1964 Lou Jacobs checks drawn on petitioner's Starbrite account (Exhs. G. 1–3), and to 110 other insufficient-fund checks dating back to 1960 drawn on petitioner's personal, Colortone, and Starbrite accounts (R. 39). These checks were conceded to be authentic (R. 622, 1012, 1021, 1024). If these checks had been routinely cleared they should have been stamped "paid" and returned to the drawer (petitioner) with his monthly statements (R. 347, 392). Paxton retained these non-debited checks along with a quantity of "paid" checks and two properly paid, but not stamped, Starbrite checks (R. 61, 134, 389, 441, 1173).[2] Paxton told the investigators he retained all checks and other documents to prove what had happened to the money and to have something to hold over petitioner and his companies (R. 251–252, 389–390).

(b) Various bank records were authenticated and introduced (R. 80). Exhibit G. 135, a computer printout kept and maintained in the ordinary course of business and found in proper sequence in the records of the bank (R. 44, 50), showed that the Starbrite

[1] Paxton was charged with conspiring with petitioner, with the substantive offense of misapplying the bank's funds to petitioner's credit, and with manipulating his own account. He pleaded guilty to the three counts (R. 87, 263). He also, without compensation, had withheld checks chargeable against other accounts (R. 175, 229, 258).

[2] The failure to stamp these two checks could have been caused by clerical or mechanical error in processing (R. 293).

account had been "closed" to the computer's posting of the three November 1964 checks payable to Lou Jacobs (R. 44, 63). Exhibits G. 132 and 133 (R. 43, 50) were Recordak copies of Starbrite statements purporting to show the three deposits during June–July 1965 (R. 471–473).

Negative evidence indicating an absence of certain bank records was also permitted. Mr. Metzheiser, the auditor of the bank, testified that, under his supervision and direction, clerical assistants checked the microfilm records of petitioner's monthly statements and records of checks actually charged against petitioner's accounts (R. 469, 559, 562–563). They would first search for a debit in the statement equal in amount to a check cleared by the clearing house, examining the statement or statements covering the three or four week period after the date of the check. If a debit was found, Mr. Metzheiser personally compared the debit to the check to determine whether it did relate to one of the checks found in Paxton's drawer (R. 469). Mr. Metzheiser was present 99% of the time that the records were being checked and personally did some of the actual checking (R. 468–469). None of the three Lou Jacobs checks (Exhs. G. 1–3) were found to have been charged against petitioner's accounts (see R. 469).[3] As for deposits, a search was made for supporting deposit tickets corroborative of the deposit credits shown on the Starbrite bank statements (R. 470–473). If none was

[3] Using these methods, however, Mr. Metzheiser determined that two of the checks in Paxton's desk drawer or file cabinet, although not stamped "paid", *had* actually been paid by the bank and charged against petitioner's account (R. 1173).

found, another searcher would be used to double-check (R. 513). No deposit tickets could be found for twelve deposits, including three deposits designated as overt acts (R. 470–473).

The bank's microfilm copies of the underlying statements were not introduced. Bank records were, however, available to the defense (R. 62), and the defense made extensive use of such records in its cross-examination (*e.g.*, R. 57, 202, 211–239, 274, 511, 526, 554–557, 576–577).

2. After conviction, petitioner and his brother, Marvin, submitted affidavits in support of a motion for a new trial, alleging that they had seen a man in the courtroom throughout the trial and had seen him talking with government witnesses and the assistant United States attorney. After verdict they saw him meet juror No. 7 (R. 1342–1347).

A hearing was held on November 13, 1967, on short notice so that the witnesses would come in fresh (R. 1348, 1368). Juror No. 7 and her husband were called as court witnesses. The juror testified that her husband had had a heart attack and that she had not wanted him to remain at home alone; instead, he drove her to the courthouse and back each day (R. 1350–1351). She testified that she had told her husband on the first day that they were not allowed to discuss the case and that she had not in fact discussed it with him (R. 1350, 1357). Her husband, she said, did not tell her what had gone on while the jury was not in the courtroom (R. 1352–1353). She acknowledeged that he had told her that some man in the corridor had asked him what his wife thought about the case but that he had said he did

not discuss the case with his wife (R. 1352). On one or two days she and her husband had had lunch with other women jurors, but they had not discussed the case (R. 1354–1356).

The husband, who had been excluded from the courtroom during the questioning of his wife, testified that he had not remained every day in the particular courtroom where his wife was a juror (R. 1358) and did not pay much attention to the legal arguments held out of the jury's presence (R. 1358–1359). He insisted that he did not tell his wife what he heard in the courtroom (R. 1359). He denied talking to people in the corridor except for replying "I don't know what my wife is doing" when approached by a man who had asked him what his wife thought about the case (R. 1359–1361). He could not remember having lunch with anyone but his wife (R. 1362).[4]

The trial court found that the juror and her husband had not discussed the case and therefore concluded that there was no reason to extend the investigation to subpoena various persons, such as government witnesses, to whom the husband was alleged to have talked (R. 1366, 1372, 1375).

ARGUMENT

1. (a) Petitioner's contention that Mr. Metzheiser's testimony concerning the work of his clerical assistants in the performance of the audit deprived him of

[4] The Assistant United States Attorney conceded that he had had one brief conversation with the husband, but only after the jury had begun deliberating (R. 1367, 1369).

his Sixth Amendment right of confrontation (Pet. 20–27) is unsound. Petitioner's accounts were extremely active (R. 984, 992, see R. 1241). To prove the negative facts of non-debiting of checks and non-depositing of funds all records pertaining to his accounts for a period in excess of five years had to be searched. The entries also had to be checked, compared, and verified. Obviously this would have been impossible for one person to do in any reasonable period of time and counsel at trial so argued (R. 1241). There was no constitutional deprivation in not calling all of the clerical personnel who did much of the underlying surveys.

When the multitude of records cannot be checked by one person alone a searcher may use assistants, and the probable correctness of the underlying bank records makes slight the danger of mistake in not calling the assistants as witnesses. Such accuracy and reliability "far outweighs any protection to the other side, afforded by emptying the bank of much of its clerical force." *United States* v. *Cotter,* 60 F. 2d 689, 693 (C.A. 2), certiorari denied, 287 U.S. 666.[5]

The authenticity of the entire audit depended upon Mr. Metzheiser's supervision and direction. "His should therefore be the testimony upon which its evidential value rests." *United States* v. *Mortimer,* 118 F. 2d 266, 269–270 (C.A. 2), certiorari denied, 314 U.S. 616; *McDonold* v. *United States,* 200 F. 2d 502, 503–504 (C.A. 5). The circumstance that the wit-

[5] Significantly, the audit revealed the fact that two checks found in Mr. Paxton's drawer had been paid, even though not so stamped.

ness had not personally examined all of the records bore on the weight to be accorded his testimony, not on its constitutional admissibility.

Furthermore, the evidence of the audit conducted under Mr. Metzheiser's supervision was largely collateral and cumulative, since the conspiracy conviction was not dependent on the showing of any shortage in the funds of the bank; various bank records, such as those found in Paxton's files and the files of the bank, were introduced in evidence and amply corroborated Paxton's testimony concerning the conspiracy. Thus, the trial court's rulings limiting the documentary evidence required to be produced lay within its sound discretion and did not prejudice petitioner's constitutional rights.

(b) Petitioner's related argument (Pet. 27–31) that Mr. Metzheiser's testimony concerning the search of the bank records violated the best evidence rule is similarly ill-founded. The fact to be proved in each instance was the absence of an entry, a matter entirely separate from the contents of actual entries. Oral evidence may be received concerning the absence of a record, and the record searched need not be produced if the search resulted in a finding that no entry existed. *Burton* v. *Driggs,* 20 Wall. 125, 136; *McClanahan* v. *United States,* 292 F. 2d 630, 636 (C.A. 5), certiorari denied, 368 U.S. 913. Petitioner's reliance (Pet. 28) on *Gordon* v. *United States,* 344 U.S. 414, is misplaced; that case involved merely a demand for production of a prosecution witness's prior statements tending to exculpate the defendant, and the Court held only that his oral acknowledgment of the in-

consistency did not necessarily preclude defense efforts to put the full written statement before the jury. In the present case the government did not endeavor to prevent petitioner from obtaining or using the bank records, either for cross-examination or as part of the defense's case.

2. The trial judge acted well within his discretion in denying the motion for a new trial. The significant fact was not whether the juror's husband had talked to anyone in the corridor but whether he had told his wife anything she should not have heard.[6] The judge passing on the motion was entitled to rely on his own observations of the juror and her husband under examination in crediting their testimony that they had never discussed the case. The judge could properly credit the husband's testimony that he was not really interested in the case and was merely sitting in on that case (and others) during his convalescence, and could find his lack of precise recollection consistent with that attitude.

[6] Rule 16G of the General Rules of the United States District Court for the District of New Jersey (Pet. 32), on which petitioner premised his motion, relates only to the questioning of a juror or relative during the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
Fred M. VINSON, Jr.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969